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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re BEN D., a Person Coming Under the
Juvenile Court Law.

B220576
(Los Angeles County
Super. Ct. Nos. BN05132, BT42763)

CHARLES K. et al.,
Petitioners and Respondents,

v.

DENNIS F.,
Appellant.

APPEAL from final order terminating parental rights. John L. Henning, Judge.
Affirmed.

Maureen L. Keaney, under appointment by the Court of Appeal, for Appellant.
Law Office of Gradstein & Gorman, Seth F. Gorman and Jane A Gorman for
Petitioners and Respondents.

Carlson & Greenburg, John Carlson; and Gerald Klausner, for Minor.

Statement of the Case and the Facts

In December 2007, R.D. (Mother) gave birth to a male child, Ben D., in Harrisburg, Pennsylvania, where she resided. The next day she consented to his adoption by a married couple, Charles K. and Sheila K. (prospective adoptive parents), who took him to their home in California, where he has lived for the approximately 21 months since. On January 11, 2008, prospective adoptive parents petitioned in Los Angeles Superior Court for independent adoption of the child. Attached to the petition was a placement agreement in which Mother consented to the adoption.

On January 7, 2008, however, the attorney representing prospective adoptive parents learned from the hospital in Harrisburg that Dennis F. (Father)—the appellant here—had inquired about the birth and introduced himself as the child’s natural father. On January 14, 2008, prospective adoptive parents therefore filed a Petition To Determine Parental Rights Of Alleged Natural Father And To Determine Necessity Of Consent, under Family Code section 7662.¹ The petition was accompanied by their attorney’s declaration and the November 19, 2007 declaration Of Mother executed under penalty of perjury. Consistent with Mother’s pre-birth declaration and the later birth certificate, the January 14, 2008 petition and attorney declaration recites that Mother had met with prospective adoptive parents in November 2007, before the child’s birth, and had told them that her pregnancy was the result of a “one time thing” with a man whose identity was unknown to her.

As the evidence at trial showed, however, Mother apparently had lied to prospective adoptive parents, to the hospital, and to the court, when she represented that the identity of the child’s father was unknown. She had lied also to Father, and had actively thwarted his efforts to take responsibility as the child’s natural father by concealing from him her arrangements to release the child for adoption, by hiding from

¹ Unspecified statutory references are to the Family Code. Prospective adoptive parents also served Father with a Notice of Alleged Paternity under section 7662 on January 24, 2008, along with a letter explaining that his parental rights could be terminated unless he acted within 30 days to establish his paternity.

him the fact that the child was born a few weeks earlier than expected, and by trying to convince him, after he learned of the birth, that the child had died.²

The evidence strongly indicated—and the trial court apparently concluded—that Father and Mother had in fact been involved for some years in a close friendship and sometimes-romantic relationship, and they had lived together before and during much of the pregnancy.³ Father had greeted news of Mother’s pregnancy with joy and excitement, and had assisted and participated with her during the pregnancy as an enthusiastic prospective father in every way he could—including taking on additional employment, purchasing gifts, baby clothes, and baby equipment, accompanying Mother to her prenatal appointments, and making living arrangements for Mother during much of her pregnancy.⁴

Father’s desire to embrace his role as a father was complicated, however, by his earlier arrest for illegal sale of firearms and cocaine. After learning that he was to become a father he had entered into a plea agreement and had been sentenced to serve 61 months in federal prison. Shortly before the child’s birth he had persuaded the sentencing court to postpone his reporting date until mid-January 2008, some weeks after the child’s anticipated end-of-December arrival. But because of Mother’s deceptions, when he entered federal prison on January 14, 2008, he had not yet bonded with—or even seen—his son.

² Because of his incarceration in New Jersey, Father’s testimony was taken by deposition. (See § 8613.5, subd. (c).)

³ A DNA test report, admitted at trial by stipulation, indicated an overwhelming probability that Father was the child’s natural father.

⁴ In a handwritten letter that was admitted into evidence at trial, Mother confessed many deceptions, admitted Father’s efforts to embrace his role as father, and professed her desire to undo her consent to the child’s adoption. However although she was represented at the trial by appointed counsel, Mother was by that time uncooperative and unavailable to testify.

Reciting a clear and convincing evidence standard of proof for its findings, the trial court found that Father was not entitled to the status of a presumed father who would be entitled as a matter of constitutional right to withhold consent for the proposed adoption by prospective adoptive parents, “because of his incarceration and consequent unavailability to parent the child.” The court concluded that Father’s consent was not necessary for the child’s adoption by prospective adoptive parents, and granted their petition to terminate Father’s parental rights. It held that Father’s consent was not necessary for the adoption, “because it is in the child’s best interest to allow the adoption to proceed without his consent, and because it would be detrimental to the child to remove him from [prospective adoptive parents].” In reaching that conclusion, the court considered, among other factors, Father’s desire and efforts to obtain custody, the child’s age, and “the effects of a change of placement on the child” after his care since birth by prospective adoptive parents. (See § 7664, subd. (b).) The court also found that the detriment to the child that would result from his removal from prospective adoptive parents’ care constituted an independent ground that would require the termination of Father’s rights even if he were considered to be a presumed Father.

Father filed a timely appeal from these rulings. (§ 7669, subd. (c); Cal. Rules of Court, rule 8.406(a).)

Discussion

1. The trial court did not err by finding that Father was not the child’s presumed Father.

Section 7611, subdivision (d), provides that an unmarried man is presumed to be the child’s father if “[h]e receives the child into his home and openly holds out the child as his natural child.” The provision for presumed-father status is intended not merely to establish paternity, but to determine whether the alleged father has demonstrated a sufficient commitment to his paternal responsibilities to be afforded rights—such as the right to the child’s custody—beyond those that attach to biological or natural fathers alone. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801-802, 804.) Here, Father did not

“receive[] the child into his home,” as would be required for him to qualify for statutory presumed-father status under section 7611, subdivision (d).

In *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*), however, our Supreme Court held that in order to comply with constitutional principles the rights of a presumed father must be given also to a biological father who does not meet the strict criteria of section 7611, if he has demonstrated a sufficient commitment to his parental responsibilities. While a biological father’s consent to the child’s adoption is required only upon the father’s showing that retention of his parental rights is in the child’s best interest, the consent of a presumed father (as well as that of the mother) is required in the absence of proof that the mother or presumed father is unfit: “If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial and otherwise—his constitutional right to due process prohibits the termination of parental rights absent a showing of his unfitness as a parent.” (*Id.* at p. 849; see pp. 849-850.)

The test is whether the father has promptly and actively developed the parental relationship ““by com[ing] forward to participate in the rearing of his child”. . . and act[ing] as a father”” (*Adoption of O.M.* (2008) 169 Cal.App.4th 672, 679). The father must “demonstrate ‘a willingness himself to assume full custody of the child—not merely to block adoption by others.’” (*Kelsey S., supra*, 1 Cal.4th at p. 849.)

Father’s key contention in this appeal is that he was entitled under the principles of *Kelsey S.* to presumed-father status, requiring that his son’s adoption cannot proceed without his consent. He contends that neither his delay in asserting his rights of fatherhood as a result of Mother’s deceptions nor his untimely incarceration can be used to strip him of his parental rights. His inability to participate personally in the child’s upbringing during the first years of the child’s life must be excused, he contends, because he has both demonstrated his

commitment to his parental role, and has made satisfactory alternative arrangements for his child's interim care during the incarceration.⁵

In *Adoption of O.M.*, the court recognized the possibility that the principles of *Kelsey S.* might entitle a father to presumed-father status despite his inability to meet its requirements, if his efforts to demonstrate his commitment to his parental responsibilities were thwarted by the mother's unilateral efforts to deny him that status. (*Adoption of O.M.*, *supra*, 169 Cal.App.4th at p. 680.) There, although some evidence indicated that the mother had acted to preclude the father from asserting his parental rights, it was the father's incarceration, not the mother's unilateral conduct, that was primarily responsible for frustrating the father's attempts to fulfill his parental responsibilities. The court found that no constitutional principle prevented it from "holding an unwed father's own criminal activity against him when assessing whether he has met the criteria for *Kelsey S.* rights," and affirmed the trial court's denial of presumed-father status. (*Ibid.*)

Prospective adoptive parents argue that here, just as in *Adoption of O.M.*, the incarceration that has prevented Father from bonding with and caring for his son, and that will continue for some years to come to prevent him from substantially participating in his son's life, precludes Father's qualification as a presumed father under *Kelsey S.* and its progeny. Even if it is true that Father had showed enthusiasm, pride, love, and concern for his child to the best of his ability after learning of Mother's pregnancy, they argue, more is required in order to establish his right to presumed-father status. He must show not just his *desire* and *intention* to be an actively involved parent; he must also demonstrate his *ability* to do so—which was rendered impossible by his long-term incarceration soon after

⁵ Our review of this issue is governed by the substantial evidence test, under which this court must resolve all evidentiary conflicts most favorably to the trial court's decision. The trial court's determination that Father was not entitled to presumed-father status under *Kelsey S.* must be affirmed unless it is unsupported by substantial evidence. (*Adoption of O.M.*, *supra*, 169 Cal.App.4th at pp. 679-680; *Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717.)

the child's birth. "He can't be a *Kelsey S.* Father because he can't be a . . . custodial parent. He just can't do it by remote."

This reasoning finds support in the explicit language of *Kelsey S.* There, our Supreme Court explained that in order to be entitled to protection of his parental rights as a presumed father, a father must "'demonstrate 'a willingness *himself* to assume *full* custody of the child—not merely to block adoption by others.''" (*Adoption of O.M., supra*, 169 Cal.App.4th at p. 681, quoting *Kelsey S., supra*, 1 Cal.4th at p. 849, with italics added.) From the evidence the trial court found that before his son's birth Father "did everything that he possibly could under the circumstances" to become a presumed father under *Kelsey S.*; but "he also did something that prevented him from becom[ing] a *Kelsey S.* father." Due to his earlier crimes, he "placed himself in a position where he could not welcome the child into his home and could not support the child. He couldn't be there for the child." Father's long-term incarceration, beginning virtually contemporaneously with the child's birth and likely to continue throughout the child's early life, rendered impossible his participation as a parent in the child's upbringing and early childhood, thus preventing Father's entitlement to the status of a presumed Father under *Kelsey S.*

The trial court's determination that Father does not come within the constitutional protections of presumed fathers under *Kelsey S.* therefore is supported by substantial evidence. Before the child's birth Father had demonstrated his commitment to his parental responsibilities to the best of his ability, but *after* the child's birth, the picture changed. Father's long-time incarceration, beginning almost contemporaneously with the child's birth, prevented the child from ever seeing, knowing, or bonding with Father as his father, and rendered Father unable to fulfill his parental commitments. From December 2008 until now—nearly his first two years of life—the child has lived (happily, by all accounts) as a member of prospective adoptive parents' family, and has had little significant contact with Father. Moreover, there can be no realistic prospect for any change in that circumstance for some years to come.

Here, as in *Adoption of O.M.*, the Father's incarceration has prevented his assumption of his son's custody. This therefore "is not a case in which a biological father has become entitled to *Kelsey S.* rights by making good faith attempts to fulfill his parental responsibilities, only to have those attempts frustrated by the unilateral actions of his child's mother." (*Adoption of O.M.*, *supra*, 169 Cal.App.4th at p. 681.) The trial court was persuaded that, but for his incarceration, Father's conduct would have entitled him to the benefits of presumed-father status under *Kelsey S.* Thus it is Father's incarceration, not Mother's unilateral efforts to frustrate his parental rights, that in fact prevented the fulfillment of his parental responsibilities. On this record we see no justification for excusing Father's failure to meet the criteria set forth in *Kelsey S.* for presumed-father status.

The facts that arguably distinguish his case from those in *Adoption of O.M.*, *supra*, 149 Cal.App.4th 672, where the natural father's conduct was marred by substantial evidence of violence and drug abuse, do not require a different result. The evidence here shows that despite his good intentions and efforts, Father simply could not fulfill the conditions required for entitlement to presumed-father status. He was and is unable to develop a personal relationship during the first formative years of his child's life; he was and is unable to provide financially for his child; and he was and is unable to "*physically* bring the child into his home." (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051.)

We need not speculate about circumstances under which an incarcerated father might be in a position to make a satisfactory showing of entitlement to presumed-father status under *Kelsey S.* We hold only that the evidence fully supports the trial court's determination that the showing was insufficient to compel that result here.

Alternative grounds also compel affirmation of the trial court’s judgment, for Father has failed to identify any evidence in the record sufficient to establish that he obtained an appropriate placement for the child (apart from the placement with prospective adoptive parents for adoption). Although Father sought to establish that his mother would care for the child during his incarceration, the mother was not present to testify, and the trial court sustained objections to hearsay purporting to provide her intentions and qualifications. That void in the evidence itself justifies the court’s determination that Father is not entitled to presumed-father status under *Kelsey S.* and its progeny. Where the father has formed no bond with the child before his incarceration, his plan to seek “only legal custody, while relegating physical custody to his parents until he is released from his present lengthy incarceration” does not satisfy the requirements of *Kelsey S.* (*Adoption of O.M.*, *supra*, 169 Cal.App.4th at p. 681.)

The trial court was fully aware of the evidence, largely uncontradicted, that Father has continued during his incarceration to demonstrate his love and concern for his child, and that he has made substantial efforts to make contact with him through letters and by picture exchanges with the aid and cooperation of prospective adoptive parents. But the fact remains that, despite his efforts, he has been, and for years to come will continue to be, unable to contribute significantly as a parent to the child’s needs—for custody, for a home to live in, for financial support, and for the personal and emotional support that would be expected and required of an actively involved and committed father.⁶

⁶ The parties—both Father and the prospective adoptive parents—nevertheless deserve appreciation and credit for their unflagging focus on the child’s well-being throughout this difficult dispute. Father has consistently expressed his appreciation for the loving care given to his son by prospective adoptive parents, while the prospective adoptive parents have remained open to Father’s desire to forge a viable relationship as his son’s natural father.

2. The trial court did not err in determining that the child’s best interest would not be served by having Father retain parental rights.

After determining that Father was not entitled to presumed-father status, the remaining question before the trial court was whether the proposed adoption by prospective adoptive parents was in the child’s best interest. (§ 7664, subd. (b); *Adoption of Arthur M.*, *supra*, 149 Cal.App.4th at p. 719 [“The child’s best interest is the *sole criterion where there is no presumed father . . .*”].) The trial court found that the adoption by prospective adoptive parents was in the child’s best interest. It therefore terminated Father’s parental rights and responsibilities with respect to the child and held that the adoption could go forward without Father’s consent. (*Adoption of Michael H.*, *supra*, 10 Cal.4th at p. 1051.)

Father’s appeal argues that even if he is not entitled to presumed-father status, the trial court erred by determining that the adoption by prospective adoptive parents would be in the child’s best interest. He affirms that prospective adoptive parents “are good people” who “had been conned by [Mother] and her mother from the very beginning,” and now that the child has been in their care for a number of years, he has “become attached” to them—as “could only be expected where a newborn is placed with caring people.” He argues, nevertheless, that it was not in the child’s best interest to allow the adoption to proceed without his consent because he has a biological father and an extended family “waiting for him.”

The trial court heard evidence on this issue, including the testimony of the prospective adoptive parents, Father, and a psychologist concerning the child’s bonding and attachment to the prospective adoptive parents and the probable impact on him if he were to be removed from the adoptive home. It is at least doubtful that the evidence could have supported the determination Father seeks even if the trial court had so found; but it is clear beyond question that the evidence does not *compel* such a determination, and that the court’s contrary finding did not abuse its discretion. For example, while conceding the evidence that an “abrupt” removal of the child from the care of prospective adoptive parents

would risk both short-term and long-term detriment to the child , Father argues that a less-than-abrupt termination of their custody might result in lesser detriment. But the trial court was not required by that logic to conclude that termination of that custody is in the child’s best interest.

Father has never had custody or care of his 21-month-old son (or any other child), and indeed, has never even seen him. He can identify no admissible evidence from which the court could have concluded that he would—or could—provide custody or care for his son during the remaining years of his incarceration, nor anything in the record that undermines or refutes the psychologist’s testimony that it is in the child’s best interest to remain in the care of prospective adoptive parents, and that disrupting his son’s custody with them would risk serious detriment.⁷

On this record, the trial court correctly determined that Father’s intentions and desires—even if sincere and heartfelt—do not override what the law holds to be the sole legitimate criterion for the decision: the child’s best interest. (*Adoption of Arthur M.*, *supra*, 149 Cal.App.4th at pp. 718-719.) The trial court’s determination is fully supported, and no abuse of discretion is shown.

⁷ In *Adoption of O.M.*, *supra*, 169 Cal.App.4th 672, the court noted that some cases have upheld the right of an incarcerated Father to retain legal custody of a child after he had successfully arranged for the child’s physical custody and care during the incarceration. (*Id.* at pp. 681-682.) It also noted, however, that none of those cases involved the circumstance here, where the incarcerated Father had neither cared for nor bonded with the child before the incarceration commenced. (*Ibid.*) And here, unlike in the cited cases, Father was unable to present admissible evidence of actual arrangements for the child’s care during his incarceration.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.